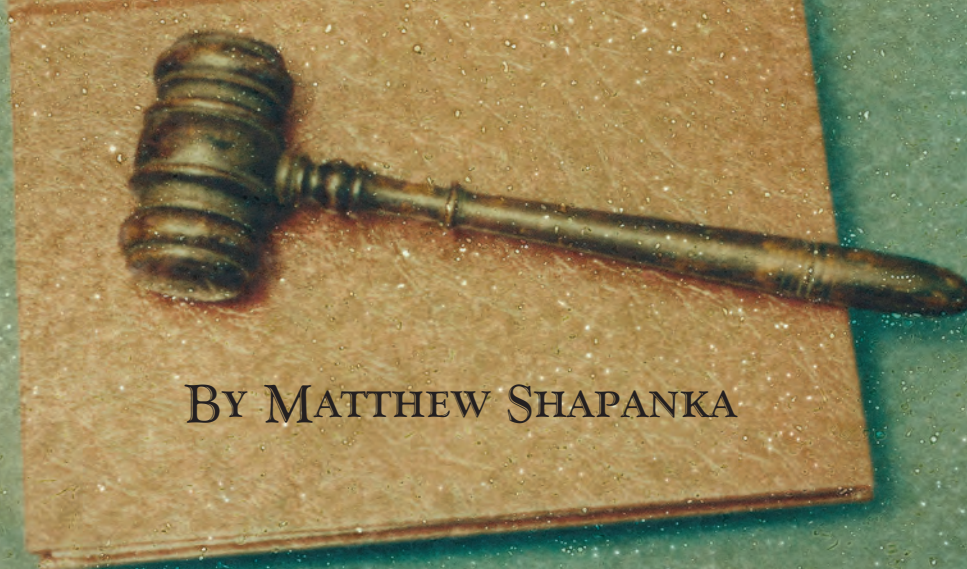


# THE CRIME OF TERRORISM: ♦

## MILITARY AND CIVILIAN APPROACHES TO PROSECUTING TERRORISTS



BY MATTHEW SHAPANKA

THE QUESTION OF WHETHER TERRORIST ACTIVITIES CONSTITUTE CRIMES PUNISHABLE BY CIVILIAN CRIMINAL STATUTES OR ACTS OF WAR SUBJECT TO MILITARY ACTION (AND, CONSEQUENTLY, MILITARY JUSTICE) HAS RETURNED TO THE FOREFRONT OF AMERICAN LAW AND POLITICS IN THE AFTERMATH OF THE TERRORIST ATTACKS OF SEPT. 11, 2001. THE MILITARY COMMISSIONS PROFFERED BY THE BUSH ADMINISTRATION TO TRY AND PUNISH ACCUSED TERRORISTS NEITHER COMPORT WITH THE HISTORICAL USE OF MILITARY COMMISSIONS OR WITH THE HISTORICAL PROSECUTION OF TERRORIST ACTS IN FEDERAL COURT. AS A RESULT, MILITARY COMMISSIONS RAISE CONSTITUTIONAL AND PRACTICAL CONCERNS THAT RENDER THEM INEFFECTIVE AS A MEANS OF PUNISHING TERRORISTS.

The terrorist attacks of Sept. 11, 2001, and the ensuing war on terror brought to the forefront in the United States the question of whether terrorist activities constitute crimes punishable by civilian criminal statutes, or whether these activities are acts of war that are subject to military action and, consequently, military justice. In the past, acts of terrorism have been prosecuted and punished through the civilian criminal justice system, regardless of whether the accused was an American citizen or a foreign national. Since 9/11, however, the United States has been engaged in open military engagements in Iraq and Afghanistan to root out and eliminate terrorism, and, therefore, the United States has been exercising military authority to detain terrorists. Unlike past terrorism cases, the vast majority of detainees

who are suspected of being terrorists has been given no trial at all, and others are subjected to trial by military commissions under guidelines set forth by the Military Commissions Act (legislation enacted in response to the Supreme Court's determination that the process of using military commissions prior to the act was unconstitutional).

The Military Commissions Act and the parallel justice system it has created are problematic for the United States from both a constitutional and practical standpoint. Constitutionally, the process of military commissions raises questions about presidential war powers, due process and habeas corpus rights for noncitizens, and congressional power over the judiciary's jurisdiction. Practically, the constitutional challenges to the military commissions—cou-

pled with their abysmal ineffectiveness in dispensing with detainee cases—creates a backlog of justice that does a disservice to the United States’ prosecution of the war against terrorism. More important, military action and military trials are simply an empirically ineffective way to combat terrorism and punish terrorists.

### Military Commissions from the Civil War to World War II

Military commissions themselves are not an innovation in military law and they are not constitutionally suspect. In 2001, Laurence Tribe, a professor at Harvard University Law School, told the Senate Judiciary Committee that “military commissions are well founded in our history, and that they do not, per se, violate the Constitution.”<sup>1</sup> From the Civil War to World War II, the United States has a long-standing history of subjecting criminal activity—particularly activity that can be construed as violating the Articles of War—to prosecution and punishment by the military.

Military commissions were used during the Civil War to “prosecute ‘cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute upon courts-martial.’...”<sup>2</sup> According to the Congressional Research Service, military commissions were used in more than 2,000 cases during the Civil War and Reconstruction.<sup>3</sup> Unlike the case with those eligible for trial by military commission under the military order issued by President George W. Bush in November 2001, the Lincoln administration attempted to try even civilian American citizens by military commission. After Lincoln suspended the writ of habeas corpus and received congressional authorization for that suspension, the military prosecuted the “supreme grand commander of the Sons of Liberty” and his co-conspirator, Lamdin P. Milligan, by commission for multiple violations of the laws of war in Indiana, at a time when much of the South was under martial law.<sup>4</sup> In the case of Milligan, however, the U.S. Supreme Court held that military commissions had no jurisdiction, because there was no actual rebellion in Indiana and the courts and civil government were open and operating normally: “Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration.”<sup>5</sup>

Given the precedent set by *Milligan*, during World War I, the Wilson administration decided to forgo the use of military commissions altogether. Although the administration did not deny the jurisdiction of military commissions in some instances—namely, in designated military territories in accordance with Article 82 of the Articles of War—the White House decided that spies who had been captured and held in the United States should not be tried by the military. One example of this decision was the case of Pable Waberski, a Russian working as a German spy who had entered the United States through Mexico during World War I and was “alleged to have informed the two men who accompanied him ... that he was coming to the United States to ‘blow things up in the United States’ and that he had in the past been engaged in exploding and wrecking munitions barges, powder magazines, and other war utilities in the United States.”<sup>6</sup> Whereas military authorities

sought to try Waberski by military commission, Attorney General Thomas Watt Gregory advised President Wilson against such a course of action on the same grounds that the *Milligan* Court had invalidated military commissions: “Martial law had not been declared ... anywhere in the United States, and the regular federal civilian courts were functioning ... throughout the United States with at least their normal efficiency.”<sup>7</sup> Furthermore, because Waberski had been captured and held outside “military territory,” Gregory believed that Waberski’s prosecution fell outside the confines of the laws of war and that he, “if guilty of any offense, is triable solely by the regular civilian criminal courts.”<sup>8</sup>

The relatively more recent World War II-era precedent of presidentially authorized military tribunals involved eight Nazi would-be saboteurs who were tried by military commission for violating the laws of war after entering the United States in secret and conspiring to attack targets in the United States.<sup>9</sup> In 1942, President Franklin D. Roosevelt issued the Proclamation Denying Certain Enemies Access to the Courts of the United States. This proclamation held the following:

... all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its states, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.<sup>10</sup>

The President followed up his proclamation with a military order appointing a military commission to try eight Germans who had been accused of espionage and attempted sabotage.<sup>11</sup> In *Ex Parte Quirin*, the saboteurs petitioned the Supreme Court for a writ of habeas corpus, arguing that the President’s military order was not authorized by the Constitution and that they should be eligible for a jury trial in civil court.<sup>12</sup>

Before reaching the merits of the saboteurs’ arguments, in *Quirin*, the Court had to overcome the constitutional question of whether or not it could even take the case. The Court held that, even though President Roosevelt’s proclamation, both by its title and text, clearly aimed to deny enemy aliens access to trials in the civilian court system, nothing prohibited judicial review of the legality of that order: “... neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts



of petitioners' contention that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."<sup>13</sup> The Court's review of the case offered the saboteurs the opportunity to challenge the legality of their detention, regardless of their guilt or innocence.<sup>14</sup> According to the Court, "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."<sup>15</sup> Thus, having fulfilled its commitment to ensuring that the accused were afforded the constitutional guarantee to petition for habeas corpus, the Court proceeded to side with the Roosevelt administration and deny the saboteurs the writ: "... the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted."

The *Quirin* Court held that Roosevelt's proclamation was constitutionally sound insofar as military commissions were explicitly authorized by Congress, as evidenced by its enactment of Article 15 of the Articles of War, which specifically authorized the use of military commissions for certain offenses.<sup>16</sup> The Court asserted that "[t]he Constitution ... invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war."<sup>17</sup>

### **Military Commissions in the War on Terrorism**

On Sept. 18, 2001, Congress passed the Authorization for Use of Military Force, which empowered the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."<sup>18</sup> Pursuant to this authorization, on Nov. 13, 2001, the President issued Military Order No. 1, in which he outlined his plans to detain and prosecute suspected terrorists. In the order, Bush found that "[t]o protect the United States and its citizens and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order ... to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."<sup>19</sup> The order goes on—without explanation—to determine that the very "nature of international terrorism" that these military tribunals cannot operate under the same "principles of law and the rules of evidence generally recognized in the United States district courts."<sup>20</sup> These findings form the President's rationale for the operative clauses of the order, which provide for the establishment of military commissions to try suspected terrorists and allow the secretary of defense to promulgate the rules governing those commissions.

Pursuant to the military order, on March 21, 2002, the

secretary of defense issued Military Commission Order No. 1, which established and also detailed the procedures for trials by military commission. These procedures included attempts to protect the rights of the accused, including the presumption of innocence until proven guilty, protection against self-incrimination, the accused's right to an attorney, and other basic provisions.<sup>21</sup> The order does, however, include an extremely broad standard for the admission of evidence, stating that all evidence "shall be admitted if ... the evidence would have probative value to a reasonable person."<sup>22</sup> Furthermore, the order fails to guarantee the accused access to potentially exculpatory evidence or even the right to be present during his or her trial on grounds that include "the protection of information classified or classifiable ... information protected by law or by rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence, law enforcement sources, methods, or activities; and other national security interests."<sup>23</sup> The order further provides that closing the proceedings renders them closed to the public and that a closed proceeding may even "exclude the Accused, Civilian Defense Counsel, or any other person ..." and also that the military defense counsel, who may not be excluded, "may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof," including the defendant or his or her attorney.<sup>24</sup>

Military Commission Order No. 1 fails to provide any judicial review of the proceedings. Under the order, verdicts and sentences handed down by a military commission can be reviewed only by the appointing authority (the officer designated by the secretary of defense to convene a military commission, the secretary himself, or the President), by a review panel appointed by the secretary of defense, by the secretary himself, and finally by the President. In addition to the procedures set forth by the secretary in 2002, amid public criticism over the interrogation policy adopted by the United States, in 2005, Congress adopted the Detainee Treatment Act (DTA) prohibiting "cruel, inhuman, or degrading treatment or punishment" of those detainees in U.S. custody awaiting trial.<sup>25</sup> In the DTA, Congress also included provisions for the judicial review of enemy combatants detained under the President's military order. Among these provisions was vesting exclusive jurisdiction over detainees' cases to the U.S. Court of Appeals for the District of Columbia Circuit and holding that no court whatsoever may consider an application for a writ of habeas corpus to challenge a detainee's detention.<sup>26</sup>

Both these DTA provisions and the procedures for military commissions promulgated by Military Commission Order No. 1 came under scrutiny by the U.S. Supreme Court in the case of *Hamdan v. Rumsfeld*. The *Hamdan* Court held that the military commissions were not statutorily authorized, and that, even if they were, as the procedures then stood, the DTA and the Military Commission Order violated the Uniform Code of Military Justice (UCMJ) as well as the Geneva Conventions.<sup>27</sup>

*Hamdan's* first objection to the military commissions stemmed from the fact that they seemed to violate Article 36

of the Uniform Code of Military Justice, which governs the procedures used for military tribunals. Article 36(a) of the UCMJ provides the following: “The procedure, including modes of proof, in cases before ... military commissions ... may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.”<sup>28</sup> The Court held that the procedures laid out for the military commissions failed to justify their substantial deviation from the normal rules of procedure for military commissions: “Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case.”<sup>29</sup> Even though “the President’s Article 36(a) determination ought to be considered in evaluating the impracticability of applying court-martial rules, the only reason offered in support of that determination is the danger posed by international terrorism.”<sup>30</sup> The Court was not convinced by this line of reasoning, however, and held that “[w]ithout for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan’s trial, any variance from the rules that govern courts-martial.”<sup>31</sup>

The Court also held that Common Article III of the Geneva Conventions applied to Hamdan. Under that provision, prisoners of war are entitled to be tried in “a regularly constituted court affording all the judicial guarantees of which are recognized as indispensable by civilized peoples.”<sup>32</sup> The Court held that the Military Commission Order failed to provide these basic guarantees, including the right to be present for the proceedings and the right to access all the evidence against the accused.

The Court did not, however, invalidate military commissions altogether. Thus, given that the Supreme Court has repeatedly upheld military commissions and the executive branch has repeatedly turned to their use, the question remains as to what is different about, and problematic with, Bush’s military order establishing military tribunals for those accused of terrorism. The military order that Bush issued on Nov. 13, 2002, fundamentally differs from, for example, Lincoln’s suspension of the writ of habeas corpus and Roosevelt’s proclamation denying access to the courts for certain enemy aliens on two grounds: (1) Bush’s order applies only to enemy aliens captured *outside* the United States; and (2) at the time of its issue, Bush’s order lacked any sort of congressional authorization.

The application of Bush’s order to those captured outside the United States fundamentally differentiates his plans for military commissions from other similar plans. In both the case of Waberski and the case of the Nazi saboteurs, those prosecuted were captured inside the United States; both were accused of violating the laws of war in so doing; and neither was captured in the course of a military operation. Those detained at Guantanamo and deemed eligible for prosecution by military commission have all been captured abroad in the course of military operations in Afghanistan and Iraq, and they were transported to a U.S. military facility elsewhere in the world.

If the exigencies of war require that detainees be tried by the military, it stands to reason that the venue of such trial would also depend on those exigencies. Neal Katyal and Laurence Tribe argue that there is ample precedent for jurisdiction of military commissions in territory abroad that is occupied by the United States.<sup>33</sup> Citing military trials in Louisiana after the Civil War and in Germany after World War II, Katyal and Tribe suggest that it is legitimate for the executive branch to establish military tribunals in occupied territory, because “no regularly constituted American courts existed in the relevant venues, and the executive tribunals were deemed necessary to secure order during the United States’ occupation of formerly enemy territory.”<sup>34</sup>

As Katyal and Tribe point out, however, establishing order in a conquered territory is not the goal of the military commissions operating today. By supporting and building an “indigenous interim government in Afghanistan,” the United States has absolved itself of its rights as a conquering nation and a source of order in that country.<sup>35</sup> The goal, rather, “focuses on punishing perpetrators of past acts rather than on providing order prospectively in conquered territory.”<sup>36</sup> Thus, because those detained and tried under Bush’s military order were captured abroad, delivered to another venue, and tried outside the zone of combat, there is no compelling need for a military trial.

In a case heard in 2008, *Boumediene v. Bush*, the Supreme Court suggested that, at least with regard to review of habeas corpus petitions, exigency and practicality are relevant considerations as to whether or not civilian courts should have jurisdiction. Writing for the majority in *Boumediene*, Justice Anthony Kennedy held the following: “In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody.”<sup>37</sup> Nevertheless, even though they may not be able to challenge their detention immediately, foreign nationals in U.S. custody are entitled to have their detention reviewed when the government is free of “such onerous burdens” that would prevent its ability to comply with habeas proceedings. In this case, the Court found that “there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions.”<sup>38</sup> Thus, because the federal courts are open for business, and because no other exigent circumstances, such as ongoing military operations, prevent the executive branch from responding to applications for writs of habeas corpus, detainees should be entitled to access to civilian courts.

### **Beyond the Law: Pragmatic Issues Related to Military Commissions and the Prosecution of Terrorism**

Beyond the matters of law and the lack of a demonstrated need for military commissions, trying individuals suspected of terrorist acts by military commission without full constitutional protections is simply ineffective, costly, inefficient, and counterproductive. In terms of efficiency, the federal court system simply disposes of more cases of terrorism than the military commission system does.

According to the *New York Times*, “military commissions have failed to deliver justice, stymied by the federal courts’ refusal to permit the president to create a system at odds with United States courts-martial and the international law of war.”<sup>39</sup> According to Human Rights Watch, “Since their establishment, the commissions have concluded only three cases, two after trial and one based on a guilty plea. During the same period, the federal courts have tried more than 107 terrorism cases, obtaining 145 convictions.”<sup>40</sup> As of November 2007, only 14 of the nearly 300 detainees held at Guantanamo had been deemed eligible for trial by military commission at all; only 10 had been charged with crimes, and only three cases were actually pending trial.<sup>41</sup> Even though the rationale for holding individuals at Guantanamo may be that they are considered enemies of the United States and just generally dangerous, 445 detainees have been released, and 70 remaining detainees have been deemed to be eligible for release. The *New York Times* estimates that only 80 or so prisoners will actually face prosecution of any kind.<sup>42</sup>

Furthermore, although “criminal prosecutions in federal court may be resource-intensive ... so are military commission proceedings.”<sup>43</sup> In fact, the cost of facilities alone are daunting, particularly given the small number of commission proceedings actually moving forward: detention facilities constructed at the U.S. Naval Station at Guantanamo Bay, Cuba, cost approximately \$54 million; the annual cost of operating the detention facility is between \$90 million and \$118 million; and the cost of building the facility to house the commissions themselves will be between \$10 million and \$12 million.<sup>44</sup> In terms of personnel, military commission proceedings drain resources from an already overextended military.

It cannot be forgotten that failing to afford detainees the due process rights afforded to other terrorists may actually undermine the United States’ effort to fight terrorism as both a matter of international law and a matter of principle. Should terrorist suspects be captured in the course of military or law enforcement operations by other nations, those nations will only extradite those suspects to the United States if the provisions of the Geneva Conventions are met: “foreign states cannot lawfully extradite accused to the United States when there is a real risk that their human rights and/or protections under the Geneva Conventions will be violated.”<sup>45</sup> If a foreign state withholds a terrorist suspect from the United States, it undermines the U.S. effort to gather information about that suspect’s terrorist activity, let alone to bring that suspected terrorist to justice in accordance with its goals.

Human Rights Watch also argues that military commission trials offer suspected terrorists martyrdom and that a better approach would be to cease the distinction between “enemy combatants” and criminal terrorist activity:

Terrorists, having political motivations, enjoy the heightened status associated with being an “enemy combatant.” When Khalid Sheikh Mohammed appeared before a Combatant Status Review Tribunal ... he wore the label of combatant proudly, compar-

ing himself to George Washington and saying that had Washington been captured by the British, he, too, would have been deemed an “enemy combatant.” Treating terrorists as criminals strips them of that badge of honor.<sup>46</sup>

Other terrorists have been treated as criminals in federal court, including Timothy McVeigh, the Oklahoma City bomber; Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing; and Zacharias Moussaoui, who was convicted of plotting to kill Americans in connection with the 9/11 terrorist attacks.

Kenneth Anderson, American University law professor, argues that the prosecutorial approach to fighting terrorism is fundamentally flawed, and he draws a distinction between “criminal” behavior and “enemy” behavior. He argues that, within a political community (in this case, the United States), criminal activity is a “*deviation* from the domestic legal order, not fundamentally an *attack upon* the very basis of that order. Terrorists who come from outside this society, including those who take up residence inside this society for the purpose of destroying it, cannot be assimilated into the structure of the ordinary criminal trial.”<sup>47</sup> It logically follows, therefore, that Anderson’s standard, if adopted, would presume that, had the Clinton administration thought of it, the perpetrators of the 1993 World Trade Center bombing should have been prosecuted by a military tribunal.

Anderson’s theory also conflicts directly with Human Rights Watch’s assessment of the sensationalism surrounding military commission trials. Anderson argues that, because of the nature and aims of terrorism, ordinary criminal prohibitions on murder and conspiracy do not adequately reflect the severity of the offense:

... the domestic legal system strains to acknowledge the awfulness of what someone like McVeigh has done: his crimes are *not* reducible to so many murders, so many injured victims, so much destruction of property, and so on in the way one thinks of ordinary criminals. The actual charges available to prosecutors in his trial, and hence the conduct of the trial itself ... missed the point of his act, which was not merely to murder people, but to make war upon the United States.<sup>48</sup>

Of course, by virtue of his citizenship, McVeigh was entitled to a trial in a civilian criminal court, yet Anderson draws no other distinction between terrorists like Timothy McVeigh and members of Al Qaeda.<sup>49</sup>

The solutions the government has offered to these issues thus far have been grossly inadequate in addressing the problems of efficiency, exigency, and process. With measures such as the passage of the Military Commissions Act of 2006 (MCA), which was passed in response to the *Hamdan* decision, Congress attempted to legitimize military commissions rather than remedy the system altogether.<sup>50</sup> For the first time in U.S. history, the act explicitly authorizes the use of military commissions, defines a Com-

batant Status Review Tribunal process for challenging detention, and establishes the rules of procedure for military commissions. Yet, despite answering the *Hamdan* Court's statutory concerns about the authorization of military commissions, the trials have not moved forward.

The Military Commissions Act has done nothing to make military commission trials move forward, nor has it provided a rationale for why trials in civil courts are impossible under current law, nor has it entirely eliminated the due process concerns that have been raised by earlier litigation. In *Boumediene v. Bush*, the Supreme Court held that § 7 of the MCA, which explicitly stripped the federal courts of habeas corpus jurisdiction for trials of detainees, resulted in an unconstitutional suspension of the writ of habeas corpus: "the Government has not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus."<sup>51</sup>

The Court's holding in *Boumediene* means that all detainees who petition the federal courts for writs of habeas corpus are entitled to have those applications heard. The Court ruled that, in the absence of an adequate process that substitutes for assessing the legality of one's detention (and that the Combatant Status Review Tribunals in place under the DTA and MCA do not constitute such an adequate substitute), the detainees must be afforded the right to habeas proceedings:

When a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context, the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.<sup>52</sup>

Given this right to review, the Court's *Boumediene* ruling further delays the process of proceeding forward with the military commission trials as many of the remaining 270-plus detainees at Guantanamo Bay challenge their detention under the decision.<sup>53</sup> As Linda Greenhouse of the *New York Times* writes, "Months or years of continued litigation may lie ahead, unless the Bush Administration, or the administration that follows it, reverses course and closes the prison at Guantanamo Bay. ..."<sup>54</sup>

In order to resolve this issue, I suggest that the United States simply drop the military commissions program and try the detainees suspected of terrorism held at Guantanamo in federal court. The relatively small number of those

who will be prosecuted renders the multimillion-dollar cost of the detention and legal facilities at Guantanamo superfluous. The constitutional questions raised by the process that accompanies military commissions has delayed justice and punishment long enough, with the reputation of the United States in protecting human rights in tow.<sup>55</sup>

In an article in the *New York Times*, Harold Hongju Koh, a professor of law at Yale University Law School, suggested that the U.S. military commission system turns on the "faulty assumption" that "our own federal courts cannot give full, fair, and swift justice" in a terrorism case.<sup>56</sup> Instead, he says, we must "promote values that must stand higher than vengeance: to hold them accountable for crimes against humanity, to tell the world the facts of those crimes and to demonstrate that civilized societies can provide justice even for the most heinous of outlaws."<sup>57</sup> As Koh points out, "If four or 400 Americans had died at the World Trade Center and the perpetrators had been caught, no one would suggest that we try the murderers anywhere but in American courts."<sup>58</sup> Laurence Tribe concedes that the United States does not necessarily have to bring Osama Bin Laden to the United States to face trial for the 9/11 attacks, but criminal prosecution has been the U.S. response to previous acts of terrorism perpetrated by Al Qaeda. Although Bin Laden remains at large, in 1998, a federal grand jury in the Southern District of New York indicted him and his co-conspirators for their role in the bombings of the U.S. embassies in Kenya and Tanzania that killed nearly 200 people and wounded more than 4,500 others.

One of the government's primary objections to trying suspected terrorists in a civilian court is the need to protect classified materials. The way to allay these fears is fairly simple: the Classified Information Procedures Act (CIPA),<sup>59</sup> which adequately ensures that state secrets are handled in a way that is sensitive to the secrecy of the material. The CIPA provides the government ample opportunity to protect classified evidence by allowing the United States to exempt certain documents from normal discovery, offering substitute information to defendants in lieu of secret evidence, or permitting the United States to stipulate to the relevant fact that the evidence in question might serve to demonstrate. The CIPA also provides an opportunity to conduct in camera hearings to determine if certain classified evidence should be exempted and also allows the records of proceedings to be sealed. Finally, the CIPA requires the Chief Justice to consult with the attorney general, the director of national intelligence, and the secretary of defense to promulgate rules designed to prevent unauthorized disclosure of classified evidence.

Regardless of the procedural implications of trials for acts of terrorism, some scholars argue that the government should not only try suspected terrorists in court but also take one step further and use the investigatory and judicial apparatus of conventional law enforcement to combat terrorism. As Mark S. Hamm writes, "the most successful method of both detecting and prosecuting cases of terrorism is through the pursuit of conventional criminal investigations."<sup>60</sup> Fighting terrorism is, therefore, a massive global law enforcement movement, rather than a fundamentally



military operation, according to Hamm: “Dismantling and degrading the international jihad network will require unprecedented international intelligence and law-enforcement cooperation, not expensive new airplanes, helicopters, and armed personnel carriers.”<sup>61</sup> Hamm’s view is that terrorist activity involves not only bombings and violent acts but also organized criminal and even lower-level criminal offenses—including, but not limited to, passport fraud, credit card fraud, international narcotics trafficking as well as low-level drug dealing, kidnapping for ransom, and arms trafficking.<sup>62</sup> As of 2005, Afghanistan was providing 87 percent of the world’s heroin—a figure that doubled in 2003 from the level in 2002 and tripled in 2004.<sup>63</sup> Afghanistan also produces more than five times the amount of marijuana that Mexico produces.<sup>64</sup>

The “global shadow economy—of dirty money, criminal enterprises, and black markets,” operating to the tune of \$2 trillion per year, is vital to the existence of terrorist organizations. As David Kaplan writes, “Without its underground bankers, smuggling routes, and fraudulent documents, al Qaeda and its violent brethren simply could not exist.”<sup>65</sup> If such criminal activity is necessary to the success of terrorist operations, it stands to reason that the United States can and should prosecute these crimes. Human Rights Watch also suggests that capturing terrorists before they commit an act of terrorism does not mean they will escape prosecution for their planned violence: “The crime of conspiracy ... is committed when two or more people plan to pursue an illegal act, and take at least one step to advance it, even if a terrorist act is nowhere near fruition.”<sup>66</sup>

It follows, then, that the United States should direct its law enforcement resources toward capturing terrorists long before they attack. The law enforcement model may, in fact, make it easier to track down and prosecute terrorists. According to Kaplan, “Criminal informants, who can be tempted with shortened prison time and money, are much easier to develop than the true believers who fill the ranks of terrorist groups. Acts of crime also attract attention and widen the chances that terrorists will make a mistake.” Efforts to exploit these facts as a matter of policy require increased cooperation among U.S. law enforcement agencies. For example, Kaplan points out that the U.S. Drug Enforcement Administration is “not even considered part of the U.S. intelligence community.” Of course, it is essential to rectify the problems of lack of cross-agency cooperation among the U.S. law enforcement community. Establishing a director of national intelligence and consolidating responsibility for the intelligence community was an important step in this direction.<sup>67</sup> Subsuming the Drug Enforcement Administration into the intelligence framework would also serve to increase coordination and would allow the United States to improve its ability to combat terrorism in its early stages. In 2005, Gen. James Jones, who serves as national security adviser in the Obama administration, said, “If we don’t get on top of the criminal aspect and the drug connections, we will lose ground in halting the spread of these [terrorist] organizations.”<sup>68</sup> The government appears to be making inroads in this area; in 2005, an article in *U.S. News & World Report* reported that the CIA’s Crime

and Narcotics Center is “spearheading the work of a dozen agencies in revamping the government’s overall assessment of international crime,” with a special emphasis on “the nexus with terrorism.”<sup>69</sup>

The global law enforcement efforts required to fight terrorism effectively are beyond the scope of this discussion. Nevertheless, if the United States vigorously pursued a policy of fighting terrorism by tracking the common criminal activity of terrorists, the U.S. judicial system would be completely qualified to prosecute these criminal acts and terrorist conspiracies. Even proponents of military commissions readily admit this assessment, for example, Kenneth Anderson writes that “U.S. district courts are, by constitutional design, for criminals. ...” If the United States were to pursue terrorists as organized criminals more aggressively, the courts would be the *only* venue in which to prosecute these individuals.

In addition, pursuing terrorists by prosecuting the other criminal activities they commit not only falls within the niche and jurisdiction of the federal courts but also eliminates all the constitutional issues associated with both “preventive detention”<sup>70</sup> and the Military Commissions Act. By prosecuting would-be terrorists in traditional American courts, the United States would allow the process of bringing these individuals to justice to move forward, rather than render detainees—whether they are harmless detainees entitled to release or high-value terrorists who should be punished—lost in the abyss of appellate litigation.

## Conclusion

Ending the regime of military commissions is good politics and good policy, and it ultimately serves the interest of justice. Even though military commissions are well grounded in American history, particularly in times of grave national crisis, they are not the best approach to investigating, prosecuting, and preventing terrorism. The Supreme Court has repeatedly declared the scheme outlined for the military prosecution of terrorists was unconstitutional or illegal, despite the U.S. government’s attempt to draw parallels between the cases heard by the Court and prior cases involving military commissions. Even the congressional authorization for using military commissions to prosecute terrorists failed to provide the appropriate constitutional safeguards against unlawful detention and prosecution. To be sure, the military commissions regime established by the Military Commissions Act—at least with the modification that was done in light of the *Boumediene* decision—is a legal and viable approach to keeping terrorists in custody and ultimately bringing them to justice. But it is not the best approach.

Laurence Tribe has suggested that congressional legislation would rectify many of the problems with military tribunals that he found disconcerting: “I would rather not see a cloud hang over convictions and sentences entered by these military commissions because of a question left open by the Supreme Court. I would rather see direct authorization of a limited use of military commissions with protections by habeas.” Even though the Military Commissions Act of 2006 provided this authorization, the repeated

judicial repudiation of the procedures used for MCA commissions, coupled with the international outcry over the military commissions and the detention regime at Guantanamo more generally, leaves a similar cloud.

Prosecuting the criminal activity that sustains terrorism seems to be a more constitutional and, according to some experts, more effective means of prosecuting terrorist activity. By investigating and prosecuting the drug crimes, immigration violations, and white-collar crimes committed by terrorists to finance their attacks, law enforcement agencies “may forestall larger conspiracies designed to kill hundreds if not thousands of civilians.”<sup>71</sup> This goal is accomplished without waiting for another terrorist attack and without an expensive, complicated, and even remotely controversial quasi-judicial regime.

Justice Anthony Kennedy, writing for the Court in *Boumediene*, said, “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled, and in our system they are reconciled within the framework of the law.”<sup>72</sup> This framework does not require that we legalize counterproductive and unconstitutional practices; rather it proposes that all aspects of the law work must together to accomplish the common goal of rooting out and punishing those who bring terror on others.

#### TFL

*Matthew Shapanka earned his B.A. in political science magna cum laude from Tufts University in 2009, completing a senior honors paper entitled, “Breaking and Bending Originalism: Scalia v. Souter in the Enduring Debate over the Original Meaning of the Religion Clauses.” He*

*currently works as a research analyst in the Executive Office for Administration and Finance for the Commonwealth of Massachusetts.*



#### Endnotes

<sup>1</sup>Laurence Tribe, Testimony Before the Senate Committee on the Judiciary, S. Hearing 107-704 at 160 (Dec. 4, 2001).

<sup>2</sup>Jennifer Elsea, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions* 19 (Congressional Research Service, 2001).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.* at 20.

<sup>5</sup>*Ex Parte Milligan*, 71 U.S. 2, 127 (1866).

<sup>6</sup>31 Op. Att’y Gen. at 356, 357 (1918).

<sup>7</sup>*Id.*

<sup>8</sup>*Id.* at 356, 364–365 (1918).

<sup>9</sup>Elsea, *supra* note 2, at 24.

<sup>10</sup>U.S. Office of the President, Proclamation No. 2561, July 2, 1942; 7 Fed. Reg. 5101, 56 Stat. 1964.

<sup>11</sup>U.S. Office of the President, Military Order. July 2, 1942.

<sup>12</sup>*Ex Parte Quirin*, 317 U.S. 1, 24 (1942).

<sup>13</sup>*Id.* at 25.

<sup>14</sup>The Court in *Quirin* explicitly noted that the merits of the charges against Quirin and his co-conspirators were

irrelevant: “We are not here concerned with any question of the guilt or innocence of petitioners” *Supra* note 12 at 25. The Court’s consideration was merely whether or not the government had the authority to try enemy noncitizens by military commission, regardless of whether or not those aliens were actually guilty.

<sup>15</sup>*Ex Parte Quirin*, *supra* note 12, at 25.

<sup>16</sup>The Articles of War were adopted in 1775 by the Continental Congress to provide a code of conduct for soldiers in the Revolutionary War. In 1806, Congress adopted 101 Articles of War for the armed forces, which remained the primary system of military justice until May 31, 1951, when the Uniform Code of Military Justice took effect; Articles of War, available at [www.loc.gov/rr/frd/Military\\_Law/AW-1912-1920.html](http://www.loc.gov/rr/frd/Military_Law/AW-1912-1920.html). World War II, and thus the military commission in question in *Quirin*, was conducted under the provision of these articles.

<sup>17</sup>*Ex Parte Quirin*, *supra* note 12, at 26.

<sup>18</sup>Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001).

<sup>19</sup>66 Fed. Reg. 57831, at 57833, § 1(e).

<sup>20</sup>*Id.* at § 1(f).

<sup>21</sup>U.S. Department of Defense, Military Commission Order No. 1 at § 5 (March 21, 2002).

<sup>22</sup>*Id.* at § 6D(1).

<sup>23</sup>*Id.* at § 6B(3).

<sup>24</sup>*Id.*

<sup>25</sup>Detainee Treatment Act of 2005, § 1003(a), Pub. L. 109-148, 119 Stat. 2739.

<sup>26</sup>*Id.* § 1005(e)(1), Pub. L. 109-148, 119 Stat. 2742.

<sup>27</sup>*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>28</sup>Article 36, Uniform Code of Military Justice, 10 U.S.C. § 836.

<sup>29</sup>*Hamdan v. Rumsfeld*, *supra* note 27, at 557, 623.

<sup>30</sup>*Id.* at 623.

<sup>31</sup>*Id.* at 624.

<sup>32</sup>*Id.* at 631–631.

<sup>33</sup>Neal K. Katyal and Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE LAW J. 1259, 1293 (2002).

<sup>34</sup>*Id.* at 1294; *see also*, *Madsen v. Kinsella*, 343 U.S. 341 (1952).

<sup>35</sup>Katyal and Tribe, *supra* note 33, at 1295.

<sup>36</sup>*Id.*

<sup>37</sup>*Boumediene v. Bush*, 553 U.S. \_\_\_, 65 (2008).

<sup>38</sup>*Id.*

<sup>39</sup>David Bowker and David Kaye, *Guantanamo by the Numbers*, N.Y. TIMES (Nov. 10, 2007).

<sup>40</sup>Human Rights Watch, *Fighting Terrorism Fairly and Effectively: Recommendations for President-Elect Obama* at 5 (November 2008).

<sup>41</sup>Bowker and Kaye, *supra* note 39.

<sup>42</sup>*Id.*

<sup>43</sup>Human Rights Watch, *supra* note 40, at 6.

<sup>44</sup>Bowker and Kaye, *supra* note 39.

<sup>45</sup>Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L LAW 16 (2002).

**CRIME** *continued on page 57*



racy and robbery”).

<sup>20</sup>UN Convention on the Law of the Sea, Art. 105, Dec. 10, 1982, 1833 U.N.T.S. (“The courts of the State which carried out the seizure [of a pirate ship] may decide upon the penalties to be imposed. ...”); Green Haywood Hackworth, 2 DIGEST OF INT’L L. 681 (1940–1944) (Pirates “may be punished by any nation that may apprehend or capture them.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404 (1987); L. F. Damrosch, L. Henkin, R.C. Pugh, O. Schachter, and H. Smit, INTERNATIONAL LAW 405 (4th ed. 2001) (“Under the universal principal of jurisdiction ... international law permits any state to apply its national law to punish piracy even when the accused is not a national of the state and the act of piracy was not committed in that state’s territorial waters or against one of its vessels.”); Charles Molloy, DE JURE MARITIMO ET NAVALI 75 (9th ed. 1744) (1676).

<sup>21</sup>See Alfred P. Rubin, THE LAW OF PIRACY 17, 92–94, 97 (2d ed. 1998).

<sup>22</sup>Adoption of the Final Act and Any Instruments, Recommendations and Resolution Resulting from Work of the Conference Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, International Maritime Organization, LEG/CONF.15/21 ¶ 15 (Nov. 1, 2005). The 2005 SUA protocols were passed in October 2005 but have not been ratified.

<sup>23</sup>IMO Doc. MSC/Circ. 622, Recommendations to Government for preventing and suppressing piracy and armed

robbery against ships and MSC/Circ. 623, Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy armed robbery against ships.

<sup>24</sup>S.C. Res. 1816 ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).

<sup>25</sup>UN Security Council Resolution 1838, S/RES/1838 (Oct. 7, 2008).

<sup>26</sup>Carolin Liss, Asia Research Centre, *Privatizing the Fight against Somali Pirates*. Working Paper No. 152 (November 2008).

<sup>27</sup>Rod Norland (Newsweek), Interview Shamun Indhabur, December 2008. Regarding private security, Indhabur said: “It will not protect them. We also have rocket-propelled grenades and we can destroy them. For those with the sonic guns, we hijacked some of them even after they fired the sonic guns. Truly speaking, when we go to sea we are drunk and we are like hungry wolves running after meat. We don’t know what we are doing until we have boarded.”

<sup>28</sup>INSURANCE JOURNAL (May 13, 2009), available at [www.insurancejournal.com/news/national/2009/05/12/100437.htm](http://www.insurancejournal.com/news/national/2009/05/12/100437.htm). (last visited Aug. 19, 2009).

<sup>29</sup>Theophilus Parsons, PARSONS ON MARITIME LAW, 299 (Little, Brown & Co., 1859); *Clarkson v. Phoenix Insurance Company*.

<sup>30</sup>*The Indian Ocean: The Most Dangerous Seas in the World*, THE ECONOMIST (July 17, 2008).

---

## CRIME *continued from page 39*

<sup>46</sup>Human Rights Watch, *supra* note 40, at 6–7.

<sup>47</sup>Kenneth Anderson, *What to do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARVARD J. LAW & PUBL. POL. 610 (2002) (emphasis in original).

<sup>48</sup>*Id.* (emphasis in original).

<sup>49</sup>*Id.* (“True enough, citizenship alone is enough to qualify a person to be tried for attacks upon that order. ...”).

<sup>50</sup>Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 (2006).

<sup>51</sup>*Boumediene v. Bush*, *supra* note 37, at 64.

<sup>52</sup>*Id.*, at 53–54.

<sup>53</sup>Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantanamo*, N.Y. TIMES (June 13, 2008).

<sup>54</sup>*Id.*

<sup>55</sup>See, for example, United Nations, Concluding Observations of the Human Rights Committee, United Nations (Sept. 15, 2006), available at [www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/0d83f7fe89d83ed6c12571fb00411eb5/\\$FILE/G0644318.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/0d83f7fe89d83ed6c12571fb00411eb5/$FILE/G0644318.pdf) (expressing concerns over the United States’ adherence to the International Covenant on Civil and Political Rights: “The Committee regrets that the State party has not integrated into its report information on the implementation of the Covenant with respect to individuals under its jurisdiction and outside its territory. The Committee notes however that the State party has provided additional material ‘out of courtesy.’ The Committee further regrets

that the State party, invoking grounds of non-applicability of the Covenant or intelligence operations, refused to address certain serious allegations of violations of the rights protected under the Covenant.”

<sup>56</sup>Harold Hongju Koh, *We Have the Right Courts for Bin Laden*, N.Y. TIMES (Nov. 23, 2001).

<sup>57</sup>*Id.*

<sup>58</sup>*Id.*

<sup>59</sup>18a U.S.C. § 4.

<sup>60</sup>Mark S. Hamm, TERRORISM AS CRIME: FROM OKLAHOMA CITY TO AL-QAEDA AND BEYOND 221 (New York: New York Univ. Press, 2007).

<sup>61</sup>*Id.*

<sup>62</sup>*Id.*, see also David E. Kaplan, *Paying for Terror: How Jihadist Groups are Using Organized-Crime Tactics—and Profits—to Finance Attacks on Targets Around the Globe*, U.S. NEWS & WORLD REPORT (Dec. 5, 2005).

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>Human Rights Watch, *supra* note 40, at 6.

<sup>67</sup>50 U.S.C. § 403.

<sup>68</sup>Kaplan, *supra* note 62.

<sup>69</sup>*Id.*

<sup>70</sup>See Human Rights Watch, *supra* note 40, at 8.

<sup>71</sup>Hamm, *supra* note 60.

<sup>72</sup>*Boumediene v. Bush*, *supra* note 37, at 70.